

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

PIERRE KEMMER, derivatively on behalf of  
CBL & ASSOCIATES PROPERTIES, INC.,

Case No. 1:20-cv-00052-JRG-CHS

*Plaintiff,*

-against-

STEPHEN D. LEOVITZ, CHARLES B.  
LEBOVITZ, FARZANA KHALEEL, DON  
SEWELL, AUGUSTUS N. STEPHAS, GARY  
L. BRYENTON, A. LARRY CHAPMAN,  
MATTHEW S. DOMINSKI, JOHN D.  
GRIFFITH, RICHARD J. LIEB, GARY J.  
NAY, and KATHLEEN M. NELSON,

*Defendants,*

and

CBL & ASSOCIATES PROPERTIES, INC.

*Nominal Defendant.*

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JOINT STIPULATION VOLUNTARILY DISMISSING DERIVATIVE ACTION  
WITHOUT PREJUDICE

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Pursuant to Rules 23.1(c) and 41(a) of the Federal Rules of Civil Procedure, plaintiff Pierre Kemmer (“**Plaintiff**”), defendants Stephen D. Lebovitz, Charles B. Lebovitz, Farzana Khaleel, Don Sewell, Augustus N. Stephas, Gary L. Bryenton, A. Larry Chapman, Matthew S. Dominski, John D. Griffith, Richard J. Lieb, Gary J. Nay, and Kathleen M. Nelson (the “**Individual Defendants**”), and nominal defendant CBL & Associates Properties, Inc. (“**CBL**” or “**Reorganized Debtor**”) (together with the Individual Defendants, “**Defendants**”), by and through their respective counsel, respectfully request that the Court enter an Order granting the request to

voluntarily dismiss the above-captioned action without prejudice. In support thereof, the parties state as follows:

WHEREAS, Plaintiff filed a *Verified Shareholder Derivative Complaint* on February 26, 2020 while attempting to act on behalf of CBL;

WHEREAS, no answer or motion for summary judgment has been filed;

WHEREAS, beginning on November 1, 2020, nominal Defendant CBL (along with its debtor affiliates, the “**Debtors**”) filed voluntary petitions for relief in the United States Bankruptcy Court for the Southern District of Texas (the “**Bankruptcy Code**”) under chapter 11 of title 11 of the United States Code (11 U.S.C. § 101, et seq.) with the Debtors’ chapter 11 cases jointly administered under Case Number 20-35226 (DRJ) (the “**Bankruptcy Case**”);

WHEREAS, upon filing of the Bankruptcy Case, any derivative claims asserted or assertable against the Debtors became property of the Debtors’ bankruptcy estates. *See, e.g., Thornton v. Bernard Tech., Inc.*, 2009 WL 426179, at \*3 (Del. Ch. Feb. 20, 2009); *In re The 1031 Tax Group, LLC*, 397 B.R. 670, 680-81 (Bankr. S.D.N.Y. 2008) (holding that breach of fiduciary duty and negligence claims are derivative and belong to the trustee); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 861 n.11 (10th Cir. 1986) (“upon the filing of a petition in bankruptcy, [a shareholder’s derivative suit] is property of the estate”);

WHEREAS, the Debtors have had exclusive control over the derivative claims, including those asserted by Plaintiff in this lawsuit, and could administer them as part of the Bankruptcy Case;

WHEREAS, pursuant to the terms of the Debtors’ *Third Amended Joint Chapter 11 Plan* (the “**Plan**”), which was confirmed by the Bankruptcy Court on August 11, 2021 and subsequently became effective on November 1, 2021, former CBL’s publicly traded shares were cancelled, and former CBL stockholders’ equity interests ceased to exist, *see Plan, § 5.4*;

WHEREAS, the Plan enjoins Plaintiff from pursuing this action, *see* Plan, § 10.9;

WHEREAS, the Debtors own and have exclusive control over such derivative claims, and they have determined to release the claims against the Individual Defendants, *see* Plan, § 10.2, and dismiss the derivative claims against the Individual Defendants in this action;

WHEREAS, the parties respectfully submit that notice of said dismissal is unnecessary to protect the interests of CBL and its stockholders for the following reasons: (i) former CBL stockholders' equity interests in the Debtors ceased pursuant to the Plan; and (ii) no parties have received nor will receive any consideration for the dismissal.

**RELIEF REQUESTED**

NOW THEREFORE, the parties STIPULATE and AGREE and request that the Court enter an Order approving the voluntarily dismissal of this action pursuant to Rules 23.1(c) and 41(a) of the Federal Rules of Civil Procedure, as follows:

1. The above-captioned action is dismissed without prejudice.
2. For the reasons stated above, notice of said dismissal is not required.
3. Each party shall bear their own costs and fees.

**IT IS SO STIPULATED.**

Dated: December 1, 2021

**EVANS HARRISON HACKETT PLLC**

By: /s/ Scott M. Shaw

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*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing CBL & Associates Properties, Inc.'s Joint Stipulation Voluntarily Dismissing Derivative Action Without Prejudice was served on counsel of record via CM/ECF, this 1<sup>st</sup> day of December, 2021.

**EVANS HARRISON HACKETT PLLC**

By: /s/ Scott M. Shaw

Scott M. Shaw (TN BPR # 019171)